the receiver, must be imputed to his bank with the consequence that the bank would thereby be precluded from enforcing the bonds and consequently the receiver would have no greater rights than the bank.

Apparently the principal decision of this court relied upon by respondent is *Curtis, Collins and Holbrook v. United States*, 262 U. S. 215. In our opinion the case is clearly distinguishable from the instant case. In that case Holbrook, Curtis and Collins, prior to the formation of the corporation,—Curtis, Collins and Holbrook Company,—were engaged in a joint adventure for the purpose of acquiring, on behalf of all of them, certain government lands. Curtis and Collins put up the money and Holbrook was to receive a commission for acquiring the lands and in addition a stock interest in the corporation which was to be formed for the purpose of taking over the title to the lands. This court held that the frauds perpetrated upon the Federal government in the acquisition of the land in question, having come to the attention of Holbrook as the agent of Curtis and Collins, notice of that fraud must be imputed to Curtis and Collins and that title to the land passed subject to the defect in title arising by reason of the fraud.

Emphasis was placed by the court below, in the instant case, as well as by respondent in his brief, upon the point that this court held that the joint adventurers in obtaining the fruits of the adventure must be charged with the knowledge of the agent through whom the fruits came, particularly in view of the fact that Holbrook was the sole agent representing his associates Curtis and Collins.

We cannot, of course, quarrel with the conclusion reached in the Curtis, Collins case, but we do not believe that it properly applies to the instant case.

It will be borne in mind that in the instant case Ragan, as an officer of the bank, was not engaged in *acquiring property for the bank*, but on the contrary was engaged in *misappropriating* the property of the bank and was, in effect,

borrowing money from the bank for the benefit of himself and his associates. The receiver, in the instant case, is merely seeking to recover the funds of the bank which were misappropriated by Ragan and his associates. While it is true that the loans were not obtained by Ragan in his own name, nevertheless it is quite clear from the Findings of the Master that the loans were for his benefit either directly, as in the case of the Westchester Discount Corporation item, or indirectly in the other cases for the purpose of preventing the bank examiners from discovering the true condition of the bank and thereby bringing trouble upon Ragan and his associates.

The notes given as formal evidence of the loans were guaranteed by the bonds issued by the surety company through their agent Cliff. Cliff participated with full knowledge in each of the transactions and the position of the surety company in the matter, through Cliff, was analogous to that of a guarantor or endorser upon the notes. The bonds, in mechanically fulfilling this function, must be considered an integral part of the notes which they secured. It is one thing to participate in a joint adventure for the purpose of acquisition of property and to take over title to that property as a result of that joint adventure, subject to defects in the title of which the joint adventurers are to be on notice actually or constructively. Necessarily the property in such case is taken subject to the known defects in the title. However, it cannot be said in the instant case that the bank was engaged in a joint adventure with Ragan and his associates in acquiring property but, as above indicated, Ragan and his associates were in effect dealing at arms length with the bank and were misappropriating the funds of the bank. Hence the Receiver in proceeding against the Surety as a participant, is only trying the *regain the dissipated property of the bank.*

If it should be assumed, for the purpose of discussion, that Ragan had acted in good faith, and that the collusion existed solely between the formal borrowers, Cronin, West-

chester, Stone and Robinson on the one hand, and Cliff on the other, there would seem to be no doubt whatsoever that inasmuch as neither the bank nor Ragan would have had notice of the collusion, and of the lack of authority of Cliff, full recovery could have been made by the bank, and the surety company would have been estopped from denying Cliff's authority. The fact is that in the instant case the bank *did not have actual notice* and it can be charged with notice only by indulging in a fiction that Ragan must be presumed to have disclosed his knowledge to the officers and directors of the bank under the doctrine that it is presumed an agent will disclose all relevant facts to his principal in connection with a pending transaction wherein he is acting for his principal. It is quite clear from the Findings of the Master in the instant case not only that Ragan *did not* disclose the situation to the officers and directors of his bank, but on the contrary actively concealed the same to serve his own purposes. In that respect the instant case is clearly within the reasoning set forth in *American National Bank* v. *Miller*, 229 U. S. 517, 522, wherein this court said that the usual presumption of notice by the agent to his principal does not apply where the agent is engaged in defrauding his principal and it is to his interest to conceal the fact from his principal. (See discussion our main brief pages 21-23).

Adverting to the distinction above suggested between a situation where an agent is engaged in *acquiring property on behalf of his principal*, as distinguished from a situation where the agent is engaged in *misappropriating or acquiring property from his principal*, it must be clear that while it is sound doctrine to say that a principal, in taking over property acquired for him by his agent, takes that benefit or property subject to defects of title or otherwise, certainly there is no basis for that doctrine where the principal is merely endeavoring to regain property of the principal which has been misappropriated by his agent.

Re-stating the distinction,—had Ragan been engaged in good faith in the proper banking function of making loans for the benefit of and on behalf of the bank, to customers of the bank, or others, there would be no doubt that defects of title affecting the paper discounted or the collateral securing the same, either brought to the attention of Ragan so as to constitute actual notice or such as reasonably to require investigation by him so as to constitute constructive notice to him,—would, under the general rule, be imputed to his principal, the bank, and the bank would thus take the paper, as an asset, as affected by the defects therein existing. However, where, as in the instant case, Ragan was not making a loan for the bank and acquiring a merchantable asset for it in the customary way, but was in effect either borrowing or misappropriating the funds of the bank, he was necessarily acting adversely to the bank and was dealing with it at arms length and was illegally attempting to act both on behalf of the bank and against the bank, and in such case the fiction of imputation of notice cannot in reason and good conscience apply. This distinction was undoubtedly in mind in the Massachusetts case of *Innerarity, et al.* v. *Merchants National Bank,* 139 Mass. 332, where Burgess, a director in a bank, borrowed money from the bank and pledged as collateral security certain bills of lading representing property entrusted to him in his private capacity as a commission agent. The court pointed out in that case that Burgess could not legally act on behalf of the bank as a director in approving the loan and at the same time act in his private capacity in borrowing from the bank, and in that connection, in quoting from the case of *Washington Bank* v. *Lewis,* 22 Pick. 24, the court said:

> " 'Whatever a director or other agent of the bank,' says the court, 'may do within the scope of his authority, would bind the bank so as to make it responsible to the person dealt with. But in the present case Thompson was the party applying for the discount, and was not acting as director, nor could he with any propriety so act. He was the party with whom the bank con-

tracted in discounting the note, and to whom the money was paid.'

"The proposition that a director of a corporation, *acting avowedly for himself or on behalf of another, with whom he is interested* in any transaction, cannot be treated as the agent of the corporation therein, is well sustained by authority." (Italics inserted)

The Innerarity case was cited, and quoted with approval in this connection, by this court in *American Surety Company* v. *Pauly* (No. 1), 170 U. S. 133, 157.

This court again referred to the foregoing distinction in *American Surety Company* v. *Pauly, supra,* on page 158, in discussing the case of *Terrill* v. *Branch Bank of Mobile,* 12 Ala. 502, 507, where the director of a bank borrowed money from the bank upon the note of a third party which had been entrusted to him for an entirely different purpose. The bank sued the maker of the note, who contended by way of defense that the bank was charged of noticed of the director's breach of trust. This court quoted with approval from the Terrill case and said:

"The Supreme Court of Alabama said: 'It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, *he was in reality the representative of his own interest. Pro re nata, his powers as a director were suspended*—he was contracting with the bank through his associates in the directory—he was borrowing, not lending its money—though a member of the board and present, too, it cannot be supposed that he cooperated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, *it cannot be presumed that he made any disclosure which would prejudice his application for a loan.*'" (Italics inserted)

Also see *Maryland Casualty Company* v. *Tulsa Industrial Loan and Investment Company,* 83 Fed. (2d) 14.

It is submitted that under the foregoing circumstances the knowledge of Ragan could not properly be imputed to his bank and that the bank would not, even if it were a going concern, be precluded from maintaining an action upon the bonds. It follows that the receiver could likewise maintain the action.

B.

THE RECOVERY UPON THE BONDS, AS AWARDED BY THE MASTER, AND THE APPLICATION OF THE DOCTRINE OF ESTOPPEL IN PAIS, ARE NOT PRECLUDED BY THE PLEADINGS AND THE ISSUES RAISED THEREON.

Respondent, in the discussion in his brief, pages 59-68,—contends that the Receiver could not recover under the theory adopted by the Master, based upon the application of the doctrine of estoppel, and asserts in that connection that the pleadings, as filed by the Receiver, precludes such relief (Respondent's brief, pages 59-60) in that the Receiver does not "represent" the creditors in such a way as to enable him to enforce damages resulting from deceit practiced indirectly upon the creditors. (Respondent's brief, pages 61 *et seq.*) Respondent has thus adopted the position taken by the court below to the effect that:

> "If creditors have certain rights personal to them, the Receiver can not enforce such rights. Michelsen, et al., v. Penney, 10 Fed. Supp. 537, 539, 540." (R., p. 286)

and again, the court below said:

> "As to whether the Receiver by proper allegations of an injury to creditors, if based on facts, could have recovered in an action brought for the benefit of such creditor or creditors, is not raised by the pleadings." (R. 288)

It seems to us that two *entirely different classes of rights* are *here confused*,—first, the right which the Receiver has,

as the statutory representative of the creditors, to enforce and liquidate assets of the receivership, and second, personal rights which one or more creditors *may* have *individually,* based upon fraud or deceit directly practiced upon them by an officer of the bank.

The case of *Michelsen* v. *Penney, supra,* referred to by the court below in that connection (R., p. 286) and also relied upon in the same connection by Respondent (Respondent's brief, p. 68) clearly demonstrates the distinction between the two classes of rights and at the same time, as we see it, supports the position of petitioner.

In the *Michelsen* v. *Penney case,* the plaintiff depositors relied, in the one bill in equity, upon both of the foregoing types of action as the basis for recovery; that is to say, they sought to recover upon (1) the alleged misconduct of the defendant director for negligence and mismanagement in connection with conducting the affairs of the bank, and also (2) for damages growing out of false representations made to them and to other depositors as to the solvency of the bank, on the theory that a deceit had thereby been practiced upon them.

As to the first type of action, the court held that the Receiver was the proper party to prosecute, inasmuch as such action would be for the purpose of recovering assets of the bank or damages for dissipation of assets of the bank and it was the function of the Receiver to take such action. As to the second type of action, the court properly held that the deceit practiced upon the individual depositor or creditor gave rise to a cause of action *personal* to him and that he alone could bring the suit.

Applying the foregoing distinction to the instant case, it is clear from the pleadings that the Receiver, in bringing suit upon the bonds, is seeking only to liquidate an asset of the bank. That the Receiver is the one properly to perform that function is clearly indicated by the provisions of Section 5234 R. S. (U. S. C., title 12, section 192, appendix, p. 14), wherein the Receiver of a national bank is required,

under the direction of the comptroller, to take possession of the books, records, and assets of every description of the bank, and to collect all debts, dues, and claims belonging to it. The Receiver's status and functions in this connection have been discussed in many cases, among the earliest of which is *Kennedy* v. *Gibson,* 8 Wall., 498, where this court said:

> "Creditors must seek their remedy through the comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. *The receiver is the statutory assignee of the association, and is the proper party to institute all suits;* they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit." (Italics inserted)

Also see discussion in this connection, Petitioner's main brief, pp. 29-31.

It would seem to be equally clear that *the Receiver is not seeking in the instant case to enforce any personal right which the individual creditors may have* for fraud or deceit practiced upon the depositors. The confusion of thought in this connection indicated in the opinion of the court below and in Respondent's brief seems to be engendered by the fact that the Master considered that the deceit practiced by Cliff, the agent of the Respondent surety company, and Ragan, the president of the bank,—upon the bank examiners, the comptroller, and indirectly upon the depositors and creditors, *constitute a basis of estoppel in pais* whereby the respondent surety company would not be permitted *to deny the authority of its agent Cliff* in the execution of the guaranty bonds in question. In other words, the fraud and deceit referred to by the Master and fully borne out by the evidence, as practiced by Cliff and Ragan, *did not constitute the basis of recovery as awarded*

by the Master. The recovery was upon the bonds, as assets of the receivership; the fraud and deceit was relied upon to prevent or preclude the respondent surety company from *impairing those assets* by denying the authority of their agent, Cliff, to execute the bonds. Hence, it was quite consistent, when viewed in this light, for the Master to hold that in this respect the Receiver represented the creditors, for the reason that the Receiver does represent the creditors in liquidating the assets of the receivership, and the Receiver was thus engaged when he was seeking to recover upon the bonds and to prevent the surety company from escaping its liability upon the bonds. The following extract from the Master's Report in that connection clearly supports this position (R. 65):

> "4. I rule that the bonds and "endorsements" in suit are binding obligations in the hands of the receiver due to the fact that he represents the bank's creditors."
>
> "In the first place it seems perfectly clear that if the Surety Company, by its duly authorized principal officers, had given these bonds for the purpose of deceiving the national bank examiners and creditors, the receiver could recover upon the bonds, regardless of absence of premium and of the existence of an agreement that the bonds were not to be enforceable obligations. *The foreseeable reliance upon these bonds of bank examiners and creditors would estop the Surety Company to deny the representations of enforceability explicit* in the terms of the instruments. *The cases establish that the receiver* as the representative of creditors *may assert the estoppel in pais thus arising."* (Italics inserted)

The cases cited by petitioner in his main brief in the discussion at pages 35-48,—are presented as supporting, by analogy, the foregoing position of the Master.

MATTER CONSTITUTING BASIS OF ESTOPPEL IN PAIS WAS NOT REQUIRED TO BE ANTICIPATED BY THE RECEIVER'S PLEADINGS.

Respondent Surety Company filed bill in equity against the bank and against the Receiver to have the bonds canceled upon the grounds that they were executed by their agent Cliff without consideration, without authority, and without its knowledge or consent, etc. (Typical Bill, R. 235.) The Receiver filed answer to said bills denying the grounds for cancellation and also affirmatively setting up the validity and effectiveness of the bonds and prayed that the court determine the amount due the Receiver under said bonds, coupled with the customary prayer for such further relief as the court might find mete and just. (R. 252)

The Receiver also filed suits at law declaring upon the bonds as assets of the receivership, asserting that they were in full force and effect (Typical Declaration, R. p. 4), to which the Surety Company filed its answer denying liability of the bonds, and asserted by way of defense, substantially the same grounds upon which it had sought cancellation of the bonds in its bills in equity. (R. 21)

All of the suits were consolidated for trial, and the situation in that respect is thus stated by the Master (R. 43):

> "These seven cases raise the question whether the Standard Surety and Casualty Company of New York (hereinafter called the Surety Company) is liable to the receiver of the Boston-Continental National Bank upon four bonds written in the name of the Surety Company by its attorney-in-fact, Percy G. Cliff. The bonds purported to guarantee payment respectively of a note of $20,000 made by Arthur D. Cronin, a note of $40,000 made by Westchester Discount Corporation, a note of $52,000 made by Joseph Stone and a note of $20,000 made by Gordon A. Robinson. In the four equity cases the Surety Company *seeks to have the bonds cancelled; the receiver counterclaims upon the bonds.* The three law cases are actions by the receiver upon the Westchester, Stone and Robinson bonds.

Amendments of the pleadings have made the issues raised in the law and equity cases identical."

In the final analysis, therefore, the Receiver, in seeking to recover upon bonds, which in every respect appeared to be regular, was met by the defenses of lack of consideration, lack of authority, etc., so far as the face of the pleadings and issues disclosed. When the evidence adduced, as primarily brought out by Respondent's witness, Cliff, disclosed the circumstances under which the bonds were issued, and the surety company sought to rely upon this evidence in support of its contentions of lack of consideration, lack of authority to issue the bonds, etc., the Receiver was entitled to assert, and the Master was entitled to support, the doctrine of estoppel in pais against the surety company. It is obvious therefore that there was no occasion nor opportunity for the Receiver to set these matters up in his pleadings, inasmuch as they necessarily resulted from the evidence adduced in the trial of the case in connection with the defense asserted by the surety company. It is thoroughly settled that matter by way of estoppel in pais may be relied upon under such circumstances to defeat the defense asserted. See, as particularly in point in that connection, the cases cited in our main brief (page 70) of:

Philadelphia W. & B. R. Co. v. *Howard*, 13 How. 307, 335, 336, 14 L. Ed. 157, 169 (1851).

Joy v. *Godchaux*, 35 F. (2d) 649 (C. C. A. 8) (1929). Cert. den. 281 U. S. 723.

Shelton v. *So. Ry. Co.*, 255 F. 182 (D. C. Tenn.) (1918).

United States Fidelity & Guaranty Co. v. *Wilson*, 41 F. (2d) 319 (C. C. A. Ark.) (1930).

The other cases therein cited refer primarily to the general proposition that a plaintiff is not required to anticipate matters of defense.

Respectfully submitted,

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APPENDIX.

Section 5234, R. S. (U. S. C., title 12, section 192):

"Sec. 192. Default in payment of circulating notes.

* * * * * * *

"Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."